BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NIKALAN JOHNSON	)	
Claimant	)	
	)	
VS.	)	
	)	
MARKET STREET CAFE	)	
Respondent	)	Docket No. 1,002,733
	)	
AND	)	
	)	
ZURICH NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the July 6, 2004 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on December 21, 2004.

APPEARANCES

Christopher A. Randall of Wichita, Kansas, appeared for the claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed that claimant suffered a work-related injury on February 25, 2002, when he fell and injured his back. On July 15, 2002, surgery consisting of a laminotomy, foraminotomy and diskectomy was performed on claimant's back at L5-S1. Claimant was released from treatment on April 21, 2003. By the date of regular hearing in this matter on April 5, 2004, the claimant had been unable to find employment. The litigated issue before the Administrative Law Judge (ALJ) was the nature and extent of claimant's disability. Specifically, whether claimant had made a good faith effort to find appropriate employment after his release from medical treatment.

The ALJ determined the claimant had made a good faith effort to return to employment and found the claimant suffered a 66.5 percent work disability based upon a 100 percent wage loss and a 33 percent task loss.

The respondent requests review of the nature and extent of disability. Respondent argues because claimant has not made a good faith effort to return to employment a wage should be imputed to him. Respondent further argues that its vocational expert opined claimant retains the ability to earn $10 an hour which would calculate to more than 90 percent of claimant's pre-injury average gross weekly wage. Accordingly, respondent concludes claimant should be limited to his 10 percent functional impairment. In the alternative, the respondent argues that averaging both vocational experts' opinions regarding claimant's wage earning capacity would result in a 20 percent wage loss which averaged with claimant's 33 percent task loss calculates to a 26.5 percent work disability.

The claimant requests the board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked as the director of operations for Market Street Café. Claimant's job duties were planning the menu, contacting vendors, advertising, hiring and firing staff as well as preparing the food.

On February 25, 2002, claimant was going downstairs when he slipped, fell and hit his back on a step. Claimant sought treatment at Wesley Medical Center, was placed on physical therapy, received steroid injections and then surgery was performed on July 15, 2002. Claimant testified he has not had any prior workers compensation claims nor any prior back problems. Claimant was released from treatment on April 21, 2003, by Dr. Bernard T. Poole.

At claimant's attorney's request, Dr. Pedro A. Murati examined the claimant on July 31, 2003. Dr. Murati diagnosed the claimant with low back pain secondary to status post laminotomy, foraminotomy and diskectomy L5-S1, right side, no fusion. Based on the AMA *Guides*[1], DRE Lumbosacral Category IV, the doctor rated claimant with a 20 percent whole person functional impairment. Dr. Murati restricted the claimant from no crawling, no lifting, carrying, pulling or pushing more than 20 pounds on occasion, rarely bend, crouch, stoop, occasional climb ladders, squat and crawl kneel and driving, frequently

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

lift/carry or push/pull 10 pounds. Upon review of a task list prepared by Mr. Jerry Hardin, the doctor opined the claimant could not perform 33 out of the 50 tasks which results in a 66 percent task loss.

At respondent's attorney's request, Dr. Chris D. Fevurly examined claimant on March 29, 2004. Based upon the AMA *Guides*, DRE Lumbosacral Category III, the doctor rated claimant with a 10 percent whole person functional impairment. Dr. Fevurly placed restrictions on the claimant of occasional lifting to 50 pounds, frequent lifting should be limited to 30-35 pounds, as well as alternate between sitting and standing as needed for pain. Upon a review of a task list prepared by Ms. Karen Terrill, the doctor agreed with Ms. Terrill's assessment that based upon his restrictions the claimant could not perform 16 out of 49 tasks which results in a 33 percent task loss.

The ALJ adopted Dr. Fevurly's opinions as more persuasive and determined claimant suffered a 10 percent functional impairment. The Board agrees and affirms.

Because claimant has sustained an injury that is not listed in the "scheduled injury" statute,[2] claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals

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[2] K.S.A. 44-510d.

[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual wages being received when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[5]

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.[6] An employee is not required to seek post-injury accommodated employment with the employer in every case.[7] An employee may be entitled to a work disability after seeking other employment when the injury prevents him or her from continuing to perform his or her job duties for the employer.[8]

The Kansas Court of Appeals in *Watson*[9] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

Claimant described his job search efforts as beginning before he was released from treatment by Dr. Poole. Claimant signed up with three agencies and reapplied every three months. The agencies would send out claimant's resumes to prospective employers. He applied for manager's positions at fast-food restaurants, steakhouses and other restaurants. Claimant noted that a lot of his time was spent watching his three children but that he tried to get out at least once a week to personally submit resumes. Claimant also indicated that he used the internet to apply for jobs. Claimant further noted that he checked the classified ads in the Wichita Eagle every Sunday and Wednesday.

Claimant contacted 36 places in the approximate year and a half since he started his job search. But there were several months where claimant made no contacts. For example, there is no record of any contacts in February or March 2003 and only one

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[5] Id. at 320.

[6] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

[7] *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001).

[8] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P. 2d 288, *rev. denied* 267 Kan. 889 (1999).

[9] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

contact in April 2003. And after June 2003, there is no indication of any contacts until the end of January 2004. Claimant's vocational expert, Mr. Hardin, opined that a reasonable job search would require a prospective employee to contact between five and ten employers every week. In this instance the claimant noted he attempted to get out once a week and based upon the list submitted certainly did not contact anywhere near the number of prospective employers that Mr. Hardin determined would be reasonable. Moreover, the exhibits offered fail to clearly establish the number of contacts generated and resumes submitted to prospective employers through the use of the agencies and the internet.

The Board finds and concludes claimant has failed to satisfy his burden of proof that he has made a good faith effort to find appropriate work following his release from treatment. It appears claimant has attempted to find employment as a restaurant manager and limited his job search in that fashion. Once claimant began his job search, he primarily limited his work search for managerial positions in the restaurant industry. However, none of those efforts have been successful. By artificially restricting his job search to managerial positions, claimant has inappropriately limited his employment prospects. Such an effort appears too restrictive given his restrictions and qualifications. Moreover, as noted, claimant has not engaged in an active job search as would be considered reasonable by his own vocational expert's standards. Accordingly, a post-injury wage should be imputed based upon claimant's retained capacity to earn wages.

Two vocational experts testified. Claimant presented testimony from Jerry Hardin and respondent presented testimony from Karen Terrill. According to Mr. Hardin, claimant retains the ability to earn $300 per week or $7.50 per hour. But according to Ms. Terrill, claimant retains the ability to earn up to $10 per hour as a management assistant or in management service type industries. The Board finds that the testimony of claimant's expert, Mr. Hardin is more persuasive in this instance. As noted, claimant has inappropriately limited his job search and has been unsuccessful in finding the jobs that pay the salary suggested by Ms. Terrill. Upon review of the entire record, and especially considering the claimant's restrictions, the Board finds that the more realistic determination is that claimant retains the ability to earn $300 per week as suggested by Mr. Hardin. This results in a 32 percent wage loss.

The Board adopts the analysis and finding of the ALJ that claimant has suffered a 33 percent task loss. Consequently, the Board modifies the ALJ's Award to find claimant has suffered a 32.5 percent work disability.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge John D. Clark dated July 6, 2004, is modified to reflect claimant has a 32.5 percent permanent partial disability.

The claimant is entitled to 59 weeks of temporary total disability compensation at the rate of $292.32 per week or $17,246.88 followed by 120.58 weeks of permanent partial disability compensation at the rate of $292.32 per week or $35,247.95 for a 32.5 percent work disability, making a total award of $52,494.83.

As of January 28, 2005, there would be due and owing to the claimant 59 weeks of temporary total disability compensation at the rate of $292.32 per week in the sum of $17,246.88 plus 93.57 weeks of permanent partial disability compensation at the rate of $292.32 per week in the sum of $27,352.38 for a total due and owing of $44,599.26, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $7,895.57 shall be paid at the rate of $292.32 per week for 27.01 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this 31st day of January 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Christopher A. Randall, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director